

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JORGE LANDA-PALAFIX,

Defendant.

NO. CR-02-2099-RHW
CV-07-3075-RHW**ORDER DENYING MOTION
UNDER 28 U.S.C. § 2255 TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE BY
PERSON IN FEDERAL
CUSTODY**

Before the Court is Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 127).

Petitioner, acting *pro se*, is currently held at the Elkon Federal Correctional Institute in Lisbon City, Ohio. On March 4, 2003, Defendant entered a guilty plea to two counts of Distribution of a Controlled Substance (Methamphetamine) in violation of 21 U.S.C. § 841(a). On January 24, 2004, Defendant was sentenced to 145 months in custody, a five year term of supervised release, and \$200 special penalty assessment. Defendant appealed his sentence to the Ninth Circuit Court of Appeals. On June 16, 2006, the Ninth Circuit affirmed the sentence, holding that this court did not clearly err in denying Defendant's motion for a downward adjustment for being a minor participant, properly found that Defendant was ineligible for the application of the safety-valve, and imposed a reasonable sentence (Ct. Rec. 109). Defendant petitioned the United States Supreme Court for

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1 review, which was denied on October 2, 2006.

2 Defendant filed this instant motion on August 27, 2007. Defendant presents
3 the following arguments in his motion: (1) the Government breached the plea
4 agreement; (2) denial of effective assistance of counsel; (3) violation of due
5 process when imposing the obstruction of justice enhancement; and (4) use of
6 minor uncounseled prior convictions to unjustly enhance sentencing exposure. The
7 Court directed service and the Government filed a response to Defendant's motion.

8 BACKGROUND FACTS

9 The relevant background facts are taken from the plea agreement:

10 In January, 2002, a confidential informant ("CI") provided
11 information concerning individuals selling pound quantities of
12 methamphetamine out of a business located in Yakima, Washington.
13 Starting in February, 2002, DEA, working with the CI, was able
14 to introduce Det. Uriel Mendoza ("Mendoza") of CCNU¹ to the co-
15 Defendants and thereafter make several purchases from those
16 individuals.

17 On February 22, 2002, Mendoza made contact with Defendant
18 Villalba-Lopez at the business. Mendoza then negotiated the purchase
19 of one-half pound of methamphetamine which had been cut into
20 ounce baggies for \$2,000.00. Villalba-Lopez first removed an ounce
21 baggie from behind some insulation in the south wall of the business.
22 Later, Villalba-Lopez recovered the rest of the methamphetamine
23 from the trunk of a vehicle located at the business. The substance was
24 tested at the DEA Laboratory and tested positive for
25 methamphetamine. The substance weighed 190.8 grams and
26 contained 49.6 grams of pure drug.

27 On February 28, 2002, Mendoza made contact with Defendant
28 Landa-Palafox and arranged for the purchase of a pound of
methamphetamine. The methamphetamine was delivered to the
business and given to Defendant Landa-Palafox by an individual later
identified as co-Defendant Ismael Sanchez Diaz. However, Mendoza
was advised that there was only one-half pound. Mendoza then gave
Defendant Landa-Palafox \$2,500.00. The substance was tested at the
DEA Laboratory and tested positive for methamphetamine. The
substance weighed 220.6 grams and contained 30.0 grams of pure
drug.

Subsequently DEA made the following purchases from

¹CCNU stands for the Yakima City/County Narcotics Unit.

Defendants Landa-Palafox and/or Villalba-Lopez:²
March 29, 2002-423.2 net grams of methamphetamine
 containing 71.9 grams of pure drug-\$5,000.00.
June 24, 2002-212.7 net grams of methamphetamine containing
 48.9 grams of pure drug-\$2,200.00.
 On October 25, 2002, Defendants Landa-Palafox and Villalba-
 Lopez were arrested by DEA. Defendant Villalba-Lopez provided a
 statement wherein he admitted that he and Landa-Palafox were
 engaged in the distribution of controlled substances.
 (Ct. Rec. 33).

DISCUSSION

1. Standard of Review

Under 28 U.S.C. § 2255, a federal prisoner may file a motion with the court to vacate, set aside, or correct his or her sentence on the grounds that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was not authorized by law; or (4) the sentence is otherwise subject to collateral attack.

2. Defendant's Claims

A. The Government Breached the Plea Agreement

Defendant argues that the Government breached the plea agreement because the plea agreement provided that the Government was to recommend a low-end sentence within the Guideline range, the Government did not recommend a low-end sentence at sentencing, and consequently, Defendant did not receive a low-end sentence at sentencing.

The plea agreement contained the following relevant provisions:

IV. 1. The parties understand that the Court will determine the Offense Level, Criminal History Category and Sentencing Range after considering the Presentence Investigation Report and considering the evidence and argument of the parties.

IV.3. The parties have reached no agreement as to the applicable Base

²The plea agreement indicated that Defendant disputed the weights and purity of the substances noted below.

1 Offense Level, and the defendant reserves the right to argue the
2 quantity of drugs attributable to the defendant and to argue for a
3 downward departure pursuant to applicable U.S.S.G. provisions at the
4 time of sentencing.

5 IV.4. The Government agrees to recommend a low end sentence
6 within the guideline range determined by the Court at the time of
7 sentencing.
8 (Ct. Rec. 33).

9 The Presentence Investigative Report applied a Base Offense Level of 32,
10 added two points for obstruction of justice and did not apply an adjustment for
11 acceptance of responsibility, which resulted in an Adjusted Offense Level of 34.
12 The PIR calculated Defendant's criminal history at a category III, with the
13 resultant sentencing range of 188-235 months

14 In its October 2003 sentencing memorandum, the Government argued that
15 Defendant had failed to establish a basis for any departure from the U.S.
16 Guidelines, and that Defendant was not eligible for the safety valve. The
17 Government recommended that the court impose a sentence of 168 months.

18 The sentencing hearing was continued a number of times due to the dispute
19 about the relevant drug quantities. Ultimately, the parties entered into a stipulation
20 regarding the relevant quantity of drugs for sentencing purposes. The parties
21 stipulated to an offense level of 32, and after a reduction for acceptance of
22 responsibility an Adjusted Offense Level of 29 (Ct. Rec. 85).³

23 At the sentencing hearing, the Government indicated that the parties had
24 agreed to a base offense level of 32, and that the mandatory ten-year sentence
25 would apply pursuant to 21 U.S.C. § 841(b). The Government requested a 120
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27 ³A Base Offense Level of 32 corresponds with at least 500 grams, but less
28 than 1.5 kilograms of a mixture containing methamphetamine, or at least 50 grams,
but less than 150 grams of actual methamphetamine. § 2D1.1

1 month sentence.⁴

2 Although it does not appear that Defendant asserted this claim on direct
3 appeal, the Government based its objection on the fact that it did not breach the
4 plea agreement. The Court agrees.

5 At the sentencing hearing, the Court computed the relevant Adjusted
6 Offense Level to be 31 and a criminal history score of 3, which resulted in a
7 sentencing range of 135 to 168 months. According to the plea agreement, the
8 Government was required to recommend the low-end of the guideline range as
9 determined by the Court. The Government recommended a 120-month sentence.

10 The Court concludes that the Government did not breach the plea agreement
11 when it recommended a 120-month sentence. As such, Defendant's first claim is
12 denied.

13 **B. Denial of Effective Assistance of Counsel**

14 Defendant argues that his counsel at sentencing was ineffective for failing to
15 require the Government to overcome the burden of proof regarding: (1) the use of
16 minor uncounseled convictions resulting in an overstatement of his criminal
17 history; (2) obstruction of justice; (3) the use of cocaine to enhance a
18 methamphetamine conviction sentence exposure; (4) sentencing entrapment; and
19 (5) breach of the plea agreement.

20 To establish ineffective assistance of counsel, Defendant must show (1) that
21 counsel's performance was deficient, and (2) that the deficient performance

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23 ⁴Although not necessarily explicit, the Government made the following
24 statement: "It resulted, under the old system, and I think still under that, with a
25 mandatory ten years, which is sort of our cutoff in this kind of case, *we're looking*
26 *for that*, and so rather than have a trial, rather than bring in a lot of people, use up a
27 lot of resources, we got an agreement to the 32, that there is a mandatory ten per
28 statute.

1 prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984);
 2 *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003). To satisfy *Strickland's*
 3 first prong, the acts or omissions must fall “outside the wide range of
 4 professionally competent assistance.” *Id.* at 690. The defendant must show “that
 5 counsel made errors so serious that counsel was not functioning as the ‘counsel’
 6 guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. A deficient
 7 performance prejudices a defense if there is “a reasonable probability that, but for
 8 counsel’s unprofessional errors, the result of the proceeding would have been
 9 different.” *Id.* at 694. “A reasonable probability is a probability sufficient to
 10 undermine confidence in the outcome.” *Id.* *Strickland’s* second prong thus
 11 “requires showing that counsel’s errors were so serious as to deprive the defendant
 12 of a fair trial, a trial whose result is reliable.” *Id.* at 687.

13 The Court starts from the presumption that Defendant’s counsel is
 14 “competent to provide the guiding hand that the defendant needs.” *United States v.*
 15 *Cronic*, 466 U.S. 648, 658 (1984); *see also Soppahthavong v. Palmateer*, 378 F.3d
 16 859, 868 (9th Cir. 2004), *quoting Strickland*, 466 U.S. at 690 (“A court must
 17 scrutinize counsel’s performance deferentially: ‘[C]ounsel is strongly presumed to
 18 have rendered adequate assistance and made all significant decisions in the
 19 exercise of reasonable professional judgment.’”).

20 i. Use of Minor Uncounseled Prior Convictions

21 Defendant filed a sentencing memorandum on October 9, 2003, in which he
 22 challenged the use of the uncounseled convictions. Moreover, it is Defendant’s
 23 burden, not the Government’s, to establish that these convictions should not be
 24 counted. *See Iowa v. Tovar*, 541 U.S. 77, 92 (2004). As such, his claim based on
 25 ineffective assistance of counsel for failing to challenge the use of the minor
 26 uncounseled convictions is denied.

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1 **ii. Obstruction of Justice**

2 Defendant argues that his counsel's performance was deficient because he
3 did not challenge the imposition of the obstruction of justice charge.

4 At the sentencing hearing, the Court indicated that it was going to apply the
5 obstruction of justice enhancement because of Defendant's refusal to acknowledge
6 the prior convictions, even in the face of overwhelming evidence to the contrary.
7 Defendant's counsel indicated to the Court that Defendant continued to maintain
8 that the specific convictions were not his. The Court concluded that Defendant
9 was making this argument in an attempt to qualify for the safety valve. Defendant
10 is not arguing that this was not his position at the time of sentencing. Defendant's
11 counsel was not ineffective in failing to argue that the Government had not met its
12 burden of establishing the obstruction enhancement, given the overwhelming
13 evidence before the Court that Defendant had obstructed justice by continuing to
14 deny that the convictions were his.

15 **iii. Use of Cocaine to Enhance Methamphetamine Conviction**

16 Defendant argues that his counsel's performance was deficient because he
17 failed to challenge the U.S. Probation officer's calculations that included the
18 cocaine. The parties stipulated to a Base Offense Level of 32, which is what the
19 Court used. The Court did not rely on the inclusion of the cocaine to set the Base
20 Offense Level. As such, Defendant's claim based on the use of cocaine to enhance
21 the methamphetamine conviction is denied. Additionally, the U.S. Guidelines
22 specifically contemplate establishing a Base Offense Level based on quantities of
23 different drugs. There was nothing improper regarding the U.S. Probation
24 Officer's calculations, so there would be no basis for an objection based on the use
25 of the cocaine.

26 **iv. Sentencing Entrapment**

27 Defendant argues that his counsel was ineffective for failing to require the
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1 Government to show that he was not entrapped. Defendant misunderstands the
2 burden of proof in establishing this defense. It is Defendant's burden to prove
3 sentencing entrapment by a preponderance of the evidence. *United States v.*
4 *Parrilla*, 114 F.3d 124, 127 (9th Cir. 1997).

5 To the extent that Defendant is arguing that his counsel was ineffective for
6 failing to argue that sentencing entrapment occurred, such a decision is left up to
7 the exercise of reasonable professional judgment. Moreover, Defendant has failed
8 to show that there was adequate basis in the record to make this argument and has
9 thus failed to show that had his counsel made this argument, the outcome would
10 have been different.

11 **v. Breach of Plea Agreement**

12 Defendant appears to argue that his counsel was ineffective because he
13 failed to argue at the sentencing hearing that the Government breached the plea
14 agreement. As discussed above, there was no breach, and there was no basis for
15 presenting such an argument to the Court.

16 **vi. Conclusion**

17 Defendant has failed to meet his burden under the *Strickland* analysis that
18 his counsel's performance was ineffective. As such, Defendant's second claim is
19 denied.

20 **C. Due Process Violation for Obstruction of Justice Enhancement**

21 Defendant argues that the Court violated his due process rights by applying
22 the obstruction of justice enhancement. A district court's factual findings must be
23 supported by a preponderance of the evidence. *United States v. Sager*, 227 F.3d
24 1138, 1146 (9th Cir. 2000). Use of the preponderance of the evidence standard
25 generally satisfies any due process concerns. *United States v. Staten*, 466 F.3d
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708, 717 (9th Cir. 2006).⁵ As discussed above, the record clearly established by a preponderance of the evidence that Defendant refused to acknowledge that the prior convictions were his, even in light of overwhelming evidence to the contrary. Thus, Defendant's claim that his due process rights were violated by the application of the obstruction of justice enhancement fails.

Moreover, petitioners cannot, in a § 2255 motion, challenge non-constitutional sentencing errors that were not raised either at sentencing or on direct appeal. *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995). Failure to make a proper objection concerning a sentence or sentencing procedure to the district court or in a direct appeal from the sentencing decision results in a waiver of the right to object in later, collateral proceedings. *Id.*

D. Use of Minor Uncounseled Prior Convictions Unjustly Enhanced Sentence Exposure

Defendant argues that the district court's use of four uncounseled convictions over-represented his criminal history. Whether to downward depart based on an over-representation of a defendant's criminal history is left to the sound discretion of the Court. *See United States v. Webster*, 108 F.3d 1156 (9th Cir. 1997). Defendant has not shown that his constitutional rights were violated or that the sentence was unlawful by the failure of the Court to depart or to not include the uncounseled convictions when computing the criminal history scores.

Also, pursuant to *Schlesinger*, Defendant has waived the right to make this argument in a § 2255 petition. 149 F.3d at 485.

Accordingly, **IT IS HEREBY ORDERED:**

⁵The *Staten* court recognized that in some cases, a clear and convincing standard is required where the application of an enhancement would have an extremely disproportionate effect on the sentence. *Id.* A two-point enhancement for obstruction does not rise to the level of requiring clear and convincing evidence.

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1 1. Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or
2 Correct Sentence by a Person in Federal Custody(Ct. Rec. 118) is **DENIED**.

3 2. Defendant's Motion to Appoint Counsel (Ct. Rec. 136) is **DENIED**.

4 3. Defendant's Motion to Compel (Ct. Rec. 123) is **DENIED** as moot.

5 4. The District Court Executive is directed in enter judgment in favor of
6 Plaintiff and against Defendant.

7 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
8 order, provide copies to Defendant and counsel for the Government, and close the
9 file.

10 **DATED** this 13th day of November, 2008.

11 *S/ Robert H. Whaley*

12 ROBERT H. WHALEY
13 Chief United States District Judge

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